APPENDIX A

[Filed Jan. 13, 2000]

UNITED STATES COURT OF APPEALS,

Tenth Circuit

No. 98-4158.

AMERICAN TARGET ADVERTISING INC.,
a Virginia corporation,
Plaintiff-Appellant,

v.

FRANCINE A. GIANI, in her official capacity as Division.
Director of the Utah Division of Consumer Protection,
Department of Commerce for the State of Utah,
Defendant-Appellee.

Bruce W. Eberle & Associates, Inc.;
Free Speech Defense and Education Fund, Inc.,
Mike Hatch, Minnesota Attorney General, et al.,
Amici Curiae.

Before TACHA, HOLLOWAY, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

American Target filed this suit against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection. American Target sought declaratory, injunctive, and other relief, asking the district court to hold the Utah Charitable Solicitations Act unconstitutional. On cross motions for summary judgment, the district court granted

summary judgment in favor of defendant. American Target filed a timely appeal, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. BACKGROUND

American Target is a Virginia corporation that provides fundraising services to nonprofit organizations. The corporation is under contract to provide such services to Judicial Watch, Inc., a nonprofit organization located in Washington, D.C. Under this contract, American Target helps manage Judicial Watch's national direct mail campaign.

By virtue of its contract with Judicial Watch, American Target is classified as a professional fundraising consultant under the Utah Charitable Solicitations Act. Utah Code Ann. § 13-22-2(11) (Supp.1999). The Act requires all professional fundraising consultants to register with the state and obtain a permit. *Id.* §§ 13-22-5,-9. To obtain the required permit, American Target must complete a written application, pay an annual fee of $250 and post a bond or letter of credit in the amount of $25,000. *Id.* § 13-22-9.

American Target has not complied with the registration requirements and is therefore barred from assisting Judicial Watch with its mailing in Utah. American Target claims that the Act violates several provisions of the U.S. Constitution, including the First Amendment, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. We address each constitutional challenge.

II. FIRST AMENDMENT

The First Amendment provides that government "shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. In a facial challenge, American Target argues that the Utah Act operates both as an impermissible abridgement of protected speech and as an unconstitutional prior restraint. Because nothing in the record indicates that the Act will have

any different impact upon interests not before this court, we analyze both prongs of the First Amendment challenge as they are presented under the facts of this case. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801-02, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). If any provision should fail as applied to American Target, we will then decide if the provision is unconstitutional on its face. To find a provision facially unconstitutional, we must conclude that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* at 797,104 S.Ct. 2118.

A. *Protected Speech*

We review de novo challenges to the constitutionality of a statute. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir.1996). In addition, where expressive activity is arguably protected by the First Amendment, this court must make an independent examination of the entire record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). After such review, we conclude that all but three of the challenged provisions are consistent with the First Amendment.

Charitable solicitations qualify as protected speech for First Amendment purposes. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Content neutral regulation of protected speech is subject to "an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). A measure designed not to "suppress the expression of unpopular views" but rather to control the "secondary" effects of speech will generally be deemed content

neutral. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Utah Act targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation. The Act does not authorize a content-based review of the charitable mailings. It simply facilitates oversight of the mailers' backgrounds and methods. Therefore, the Act is content neutral, and we accordingly subject it to intermediate scrutiny. The state must demonstrate that the Act (1) serves a substantial governmental interest and (2) is "narrowly drawn" to serve that interest "without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. at 636-37, 100 S.Ct. 826. [1]

"The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). The stated purpose of the Utah Act is "to protect . . . citizens from harmful and injurious acts." Utah Code Ann. § 13- 1-1 (1996). The registration and permit provisions require applicants to make detailed disclosure about past activities, including descriptions of any injunction, judgment or administrative order entered against them. Utah Code Ann. § 13-22-9 (Supp.1999). The grounds for denying a permit center on findings of fraud and misrepresentation. *Id.*

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[1] American Target contends that we should apply intermediate scrutiny to this content neutral regulation only if we first determine that it is a time, place or manner restriction. The *Turner Broadcasting* court made no such qualification and we shall not impose one here. In fact, the Supreme Court has suggested that there is no meaningful distinction between evaluation of a content neutral regulation of expressive conduct and a content neutral time, place or manner restriction. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (observing that the test applied to expressive conduct "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions").

§ 13-22-12. The Act's general declarations and specific prohibitions clearly target fraud. The Act therefore serves a substantial government interest.

All of the Act's provisions must be narrowly drawn to serve this recognized governmental purpose. We review those statutory provisions construed by the district court to determine whether the state has narrowly tailored them to prevent fraud.

1. Registration and Disclosure Requirements

The Act requires professional fundraising consultants like American Target to meet certain registration and disclosure requirements. Consultants must identify those involved in the solicitation process, disclose the purpose and method of solicitation, declare the existence of any injunctions, judgments, administrative orders, or criminal convictions involving moral turpitude, and provide copies of all agreements concerning fundraising. *Id.* § 13-22-9.

The Supreme Court has indicated that registration and disclosure provisions do not raise First Amendment problems. In *Secretary of State v. Munson*, 467 U.S. 947, 968 n. 16, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), the Court recognized that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." In *Riley*, the Court stressed that the state "may constitutionally require fundraisers to disclose certain financial information." *Riley*, 487 U.S. at 795, 108 S.Ct. 2667. The *Riley* court further found that "the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file." *Id.* at 800, 108 S.Ct. 2667.

Mandatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations. These requirements directly promote Utah's legitimate

interest in combating fraud while not unnecessarily interfering with solicitors' protected speech. We find that the registration and disclosure provisions of the Utah Act are narrowly tailored to serve the state's substantial interest in fighting fraud.

2. Registration Fee

The Utah Act also requires fundraising consultants to pay an annual registration fee. The fee imposed must be "reasonable, fair and reflect the cost of services provided." Utah Code Ann. § 63-38-3.2(2)(a) (Supp.1999); Utah Code Ann. §13-22-9(1)(a) (Supp.1999). Prior to fiscal year 1997, the state assessed a fee of $150. The Utah Division of Consumer Protection raised the fee to $250 for fiscal year 1997 and thereafter. In an affidavit filed with the district court, Director Giani stated that the Division raised the fee to defray increased regulatory costs caused by a significant jump in applications.

Arguing that the $250 fee is excessive, American Target relies almost exclusively upon *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). In *Murdock*, the Supreme Court struck a city ordinance that, as applied, required Jehovah's Witnesses to pay a license tax to engage in door-to-door solicitation. The Court declared that "[f]reedom of speech . . . [should be] available to all, not merely to those who can pay their own way." *Id.* at 111, 63 S.Ct. 870. The Court recognized some limits to this principle, however. Cataloguing the failings of the license tax at issue, the Court observed that it was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113-14, 63 S.Ct. 870. The Court observed that "[t]he constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized." *Id.* at 115 n. 8, 63 S.Ct. 870.

Murdock "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally

permissible." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Rather, a regulatory fee may be constitutional only if it serves a "legitimate state interest." *Id.* The state of Utah, through the Giani affidavit, adequately connects the $250 regulatory fee to the state's recognized interest in protecting its citizenry from fraud. The fee does no more than defray reasonable administration costs. We therefore find the fee narrowly tailored to the identified interest.

3. Bond or Letter of Credit

To obtain a permit under the Act, American Target must also provide proof that it is bonded or provide a letter of credit in the amount of at least $25,000. Utah Code Ann. § 13-22-9(4)(a). The statute requires that the bond or letter of credit "be payable to the state for the benefit of parties who may be damaged by any violation of this chapter." *Id.* § 13-22-9(4)(b).

The district court relied upon *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), to uphold the bonding provision. In *Dayton Area*, the Sixth Circuit affirmed a district court's holding that a $25,000 surety bond requirement under the Ohio Charitable Solicitations Act was narrowly tailored to serve a legitimate state interest. *Id.* at 1486. Significantly, the *Dayton Area* court reviewed a district court's partial grant and partial denial of a preliminary injunction. This procedural posture limited the nature of the First Amendment analysis and limited the court to an abuse of discretion review. In our de novo review, we must decide as a matter of law whether the $25,000 bond is narrowly tailored to the identified state interest. *Dayton Area* is therefore inapposite.

The bond requirement, on its face, supports a different state interest than the other challenged provisions of the Act. The disclosure and fee requirements enable prophylactic oversight

of professional fundraisers. The bond requirement provides a victim relief fund for those injured through violations of the Act. When a professional fundraiser violates the Act, the state naturally expects the violator to satisfy a tort judgment. But this interest in redress applies across the law in other tort contexts. More importantly, this interest is adequately served by the preventive measures within the Act. Extensive disclosure and vigorous oversight diminish the likely need for a victim compensation fund. An ounce of prevention here is preferable to a pound of cure.

The actual impact of the bond requirement supports our conclusions. The president of American Target, in a sworn affidavit, stated that the company must provide 100 percent collateral for the amount of any outstanding bond. The company does not have enough unpledged collateral on hand to secure the Utah bond and must borrow the full amount. *Id.* The requirement therefore imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. Bonding may peripherally promote Utah's interest in regulatory oversight, but this goal is "sufficiently served by measures less destructive of First Amendment interests." *Village of Schaumburg,* 444 U.S. at 636, 100 S.Ct. 826. Through the registration, disclosure and fee requirements, the statute provides less intrusive means of fraud prevention. The chilling financial reality of the bond "unnecessarily interfer[es] with First Amendment freedoms," *id.* at 637, 100 S.Ct. 826 and is therefore unconstitutional as applied.

Having found the bond provision unconstitutional as applied to American Target, we now must decide whether any attempt to enforce this provision would create "an unacceptable risk of the suppression of ideas." *Taxpayers for Vincent,* 466 U.S. at 797, 104 S.Ct. 2118. We find that it would. There is evidence in the record that qualifying for a letter of credit is much like qualifying for a loan. While some consultants may qualify for the required letter without 100 percent collateral, this possibility does not save the provision. We are not pre-

pared to allow the constitutionality of this requirement [to] turn on the applicant's credit rating. Furthermore, any posted collateral would go to support victim recovery. We have already found that the guarantee of victim relief only peripherally supports the recognized state interest in regulatory oversight. The chilling impact of the bond upon protected speech outweighs any fraud protection it might provide. We therefore find that the bond/letter of credit provision of the Utah Act is unconstitutional on its face.

B. *Severability*

Having found one part of the Act unconstitutional, we must decide whether the objectionable provision can be severed. Severability is an issue of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (per curiam). In Utah, the test is "whether the legislature would have passed the statute without the objectionable part. . . . Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a 'saving clause.' " *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 779 (Utah 1994) (quoting *Union Trust Co. v. Simmons*, 116 Utah 422, 211 P.2d 190, 193 (1949)).

There is no saving clause in the Utah Act to aid our interpretation. Therefore, we must look to whether the statutory provisions "are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety." *Id.* The bonding/letter of credit requirement is not interrelated in any meaningful sense with the remainder of the Act. Indeed, on its face, the bonding requirement articulates a different purpose than do the other provisions. Elimination of the bonding requirement therefore will not frustrate the Act's stated purpose. Accordingly, we find that it is severable under Utah law.

C. *Prior Restraint*

American Target also claims that the Act operates as an impermissible prior restraint upon protected speech. A

scheme of prior restraint gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). American Target is barred from aiding any solicitations within the state until it complies with all the Act's requirements. Utah Code Ann. § 13-22-6(1)(b)(xiv)(B) (Supp.1999). The Act therefore definitionally qualifies as a prior restraint. Because we have struck the bonding requirement, we consider only whether the other challenged provisions establish an unconstitutional prior restraint. [2]

"Prior restraints are not unconstitutional per se." *Southeastern Promotions*, 420 U.S. at 558, 95 S.Ct. 1239. However, "[a]ny system of prior restraint ... comes to [the] Court bearing a heavy presumption against its constitutional validity." *Id.* (internal quotation marks and citation omitted). In particular, there are "two evils" that will not be tolerated in such schemes. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). First, no system of prior restraint may place " 'unbridled discretion in the hands of a government official or agency.' " *Id.* (quoting *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226, 110 S.Ct. 596.

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[2] Much of the prior restraint law developed in the context of ordinary licensing and zoning schemes. None of the schemes we encountered carried a restraint like the bonding requirement under the Utah Act. Having already found that requirement an unconstitutional burden upon free speech, we do not address how such a restraint would affect our analysis here. We simply note that so substantial a bonding requirement might operate as a full restraint where applicants cannot muster the required collateral.

1. Unbridled Discretion

a) § 13-22-9(1)(b)(xiv)

American Target contends that state officials enjoy too much discretion over the administrative process. The Director of the Division of Consumer Protection has the power to deny, suspend or revoke an application, registration, permit or information card. Utah Code Ann. § 13-22-12(1). To exercise this power, the director must find that such action serves the "public interest" and that the regulated entity has violated one or more of thirteen grounds set forth in the statute. *Id.*[3] These

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[3] Section 13-22-12(1) provides in full:

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively

grounds include, among others, the filing of an application that is "incomplete or misleading in any material respect." *Id.* § 13-22-1 2(i)(a). The Act also contains a list of specific information which must be included in any application. *Id.* §13-22-9.[4] The director retains the authority to request "any

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similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

[4] Section 13-22-9 provides, in relevant part:

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;

(ix) disclosure of any injunction, judgment, or administrative order against the applicant or the applicant's conviction of any crime involving moral turpitude;

(x) a copy of any written agreements with any charitable organization;

(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or

additIonal information the division may require." *Id.* § 13-22-9(1)(b)(xiv). American Target contends that this catch-all provision confers unbridled discretion upon the director: she may demand any piece of information from an applicant and lawfully deny a permit if the applicant refuses such request. We agree.

The state may not condition protected speech "upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958). " '[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.' " *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

In a facial challenge to a city licensing scheme, the Supreme Court considered a catch-all provision that authorized the imposition of "other terms and conditions deemed necessary and reasonable by the Mayor." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 754 & n. 2, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (internal quotation marks and citation omitted). The Court held that this section of the statute was unconstitutional on its face because it presumed that the

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principal of the applicant;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;

(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

mayor would "act in good faith and adhere to standards absent from the ordinance's face." *Id.* at 770, 108 S.Ct. 2138. "The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation." *Id.* Like the catch-all provision in *City of Lakewood*, §13-22-9(1)(b)(xiv) confers unconstitutional discretion on the director because it presumes that she will use her blanket authority to request additional information only in good faith and consistent with implicit standards. As a result, §13-22-9(1)(b)(xiv) threatens to overwhelm the narrow and objective provisions that precede it. *Cf. Beal v. Stern*, 184 F.3d 117, 126 n. 6 (2d Cir.1999) ("The existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint.").

We therefore hold that § 13-22-9(1)(b)(xiv), construed in light of the director's authority to deny an incomplete application, is unconstitutional on its face and we sever it from the Act. [5] Any attempt by the state to invoke this blanket authority "would create an unacceptable risk of the suppression of ideas." *Taxpayers for Vincent*, 466 U.S. at 797, 104 S.Ct. 2118.

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[5] Utah law on severability, see supra Part II.B., requires us to sever this unconstitutional provision. We must decide "whether the remaining sections [of the statute], standing alone, will further the legislative purpose." *Stewart*, 885 P.2d at 779. The remaining provisions mandate disclosure of an applicant's biographical, financial and criminal background along with copies of relevant agreements. This disclosure enables the state oversight necessary to achieve the Act's stated purpose of "protect[ing] . . . citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1.

b) § 13-22-12(1)(b)(vii)

Section 13-22-12(1)(b)(vii) authorizes the state to deny a permit if the applicant has "failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fundraising counsels or consultants." Instead of providing "narrow, objective and definite standards to guide the director," *Shuttlesworth*, 394 U.S. at 150-51, 89 S.Ct. 935 this provision imposes a vague requirement: the applicant must "reasonably supervise" its agents and employees. Nowhere does the statute define or limit the nature of such supervision. "Imprecise language may vest authorities with the discretion to determine which groups and individuals are entitled to exercise First Amendment rights." *Association of Community Orgs. for Reform Now v. Municipality of Golden*, 744 F.2d 739, 747 (10th Cir. 1984).

Given the placement of this provision within the statutory text, we can only speculate as to a limiting construction. Perhaps the provision is designed to merely punish the applicant if an agent or employee violates the Act under his failed supervision. However, we decline to read words into the statute that the Utah Legislature did not ratify. The state must make explicit the necessary limits to the director's discretion. As enacted, § 13-22-12(i)(b)(vii) also confers unbridled discretion on the state and therefore is unconstitutional on its face.[6]

2. Time Limits

Time limits upon a prior restraint allay "the risk of indefinitely suppressing permissible speech." FW/PBS, 493 U.S. at 227, 110 S.Ct. 596. In evaluating a facial challenge to a state act, we must consider the state's own construction of the act, including its implementation and interpretation. *Forsyth*

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[6] Based on the foregoing analysis of severability, we also find this provision severable from the statute as a whole

County, 505 U.S. at 131, 112 S.Ct. 2395 (1992). The State, by regulation, requires that all initial applications and renewals of registration be processed within ten days of their receipt by the Division of Consumer Protection. Utah Admin. Code R152-22-3(4) (WESTLAW through July 1999). American Target claims that the ten-day delay for administrative processing is unconstitutionally lengthy.

In *Freedman v. Maryland*, 380 U.S. 51, 58-60, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained.[7] Here the restraint imposed prior to judicial review is both clearly specified and brief. Upon denial of an initial or renewal application, the applicant is entitled to an administrative determinations must then be issued with five business days of the hearing. *Id.*

In addition, the state maintains the status quo during administrative review. The status quo for a new applicant like

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[7] The *Freedman* court also found that prompt judicial review must be available and that the licensor must bear the burden in court to suppress the protected speech. *Freedman*, 380 U.S. at 58-59, 85 S.Ct. 734; *see also* FW/PBS, 493 U.S. at 227, 110 S.Ct. 596 (summarizing the *Freedman* factors).

The modern interpretation of these *Freedman* safeguards has provoked some confusion among the circuits. *See, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir.1998) (summarizing the circuit split over the meaning of prompt judicial review); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 996 n. 12 (4th Cir.1995) (en banc) (concluding that the splintered opinions in *FW/PBS* leave the burden of proof safeguard "subject to some speculation"). In its briefs, American Target makes only stray references to the Act's impact on judicial relief. We find such references insufficient to trigger appellate review and therefore do not address the scope of judicial relief necessary under *Freedman*. *See Murrell v. Shalala*, 43 F.3d 1388, 1390 n. 2 (10th Cir.1994) (finding that a "few scattered statements" in plaintiff's argument "fail[ed] to frame and develop an issue sufficient to invoke appellate review").

American Target is non-operation. *See East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir.1995) (status quo for business seeking permit is non-operation); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir.1994) (applicant not free to operate while license is pending). Thus, Utah's restraint of American Target during the brief period of administrative review is constitutional.

III. COMMERCE CLAUSE

American Target also claims that the Act as applied places an undue burden upon interstate commerce. We disagree. We review American Target's Commerce Clause challenge de novo. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir.1996). The Commerce Clause not only empowers Congress to "regulate Commerce . . . among the several States," U.S. Const. art I, § 8, cl. 3, but also "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," *Oregon Waste Sys. v. Dep 't of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed..2d 13 (1994). This implied restraint upon the states is often referred to as the negative or "dormant" aspect of the Commerce Clause.

To evaluate a dormant Commerce Clause challenge, this court must first determine whether the act in question "regulates evenhandedly" among economic interests or instead "discriminates against interstate commerce" either on its face or in practical effect. *Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345 (quoting *Hughes V. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)). Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The Utah Act plainly does not distinguish between in-state and out-of-state businesses. American Target's status as a Virginia corporation doing business in Utah is legally irrelevant. It is American Target's status under the Act as a professional fundraising consultant that triggers

the licensing requirements.

Because the Act regulates evenhandedly among in-state and out-of-state consultants, this court must balance various interests in the constitutional assessment. The Act must be upheld if it serves a "legitimate public interest," its effects on interstate commerce are only "incidental," and the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess. *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir.1992).

As discussed previously, the Supreme Court has recognized the public interest in curtailing fraudulent solicitations. *Riley*, 487 U.S. at 792, 108 S.Ct. 2667; *Village of Schaumburg*, 444 U.S. at 637, 100 S.Ct. 826. Because we have found that the bond is an unconstitutional burden upon free speech, the $250 fee, along with the registration and disclosure requirements, remain for our consideration. Since the Act applies to all fundraising consultants who operate within Utah, its provisions certainly burden interstate commerce for out-of-state firms like American Target. However, the burden is minimal. Thus, we must consider whether the identified public purpose could 'be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors. Therefore, we find that the burdens the Act imposes on interstate commerce are incidental and not clearly excessive in relation to the legitimate public interest.

American Target contends that another line of Commerce Clause authority applies to this case. Citing *National Bellas Hess, Inc., v. Department of Revenue*, 386 U.S. 753, 87 S.Ct, 1389, 18 U Ed.2d 505 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), American Target identifies a bright-line rule prohibiting the regulation of interstate commerce where the regulated entity's

only connection to the state is by common carrier or the U.S. mails. Both *Bellas Hess* and *Quill* concern the levy of taxes upon out-of-state entities. The Supreme Court in *Quill* repeatedly stressed that it was preserving *Bellas Hess'* bright- line rule "in the area of sales and use taxes." *Quill,* 504 U.S. at 316, 112 S.Ct. 1904; *see also id.* at 311, 112 S.Ct. 1904 ("*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."); *id.* at 317, 112 S.Ct. 1904 ("[O]ur reasoning . . . does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes."). The Utah Act imposes licensing and registration requirements, not tax burdens. The *Bellas Hess / Quill* bright-line rule is therefore inapposite.

IV. DUE PROCESS

Finally, American Target submits that the Utah Act as applied confers state jurisdiction in a manner inconsistent with due process. Again, we disagree.

The Due Process Clause of the Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Judicial jurisdiction cannot extend to an individual consistent with due process unless "he have certain minimum contacts [with the jurisdiction] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The Supreme Court has tailored this jurisdictional principle to the corporate context. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King v. Rudzewicz,* 471 U.S. 462, 476, 105

S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Keeton v. Hustler Magazine,. Inc.*, 465 U.S. 770, 774-75, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)).

In its agreement with Judicial Watch, American Target promises to suggest lists of potential Utah donors, design targeted mailings, help select optimum dates for mailing, and act as a general consultant concerning the solicitation process. To fulfill its obligations under this agreement, American Target must purposefully direct efforts toward residents of the state. Therefore, jurisdiction can be asserted consistent with due process.

Without apparent authority, American Target claims that there must be a higher level of business activity to support the legislative or regulatory jurisdiction asserted here. Charting the due process limits on legislative jurisdiction, the Supreme Court has employed language reminiscent of that used in the personal jurisdiction caselaw. "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 315 n. 2, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) (Harlan, J., dissenting). *See generally Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir.1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines"). If there is a distinction to be drawn between the two inquiries, it is not one necessary to the disposition of this matter. American Target has sufficiently satisfied either formulation of minimum contacts to support Utah's assertion of regulatory jurisdiction.

For the reasons discussed above, we AFFIRM in part and REVERSE in part. In addition, we deny the outstanding motion by Appellant American Target to strike the brief of amici curiae Mike Hatch, Minnesota Attorney General, et al., and grant the motion for leave to respond.

APPENDIX B

[Filed: Aug. 19, 1998.]

UNITED STATES DISTRICT COURT,
D. UTAH, CENTRAL DIVISION

No. 2:97CV610 B.

AMERICAN TARGET ADVERTISING INC.,
a Virginia Corporation,
Plaintiff,

v.

FRANCINE A. GIANI, in her official capacity as Division.
Director of the Utah Division of Consumer Protection,
Department of Commerce for the State of Utah,
Defendant.

MEMORANDUM OPINION AND ORDER

BENSON, District Judge.

Plaintiff American Target Advertising, Inc., a Virginia corporation, is a political consulting firm specializing in political fund-raising. American Target filed this lawsuit against Defendant Francine Giani in her official capacity as Director of the Division of Consumer Protection of the Utah Department of Commerce, seeking to enjoin Utah's enforcement of the Utah Charitable Solicitations Act, codified at Utah Code Ann. § 13-22-1 *et seq.*

Cross-Motions for Summary Judgment are before the Court.

I. BACKGROUND

A. The Statute

The Utah Charitable Solicitations Act (the Act), codified at Utah Code Ann. §13-22-1 *et seq.*, establishes a regulatory system for licensing out-of-state professional fund-raising consultants. Under the Act, fund-raising consultants must (1) apply for a license from the state, (2) make financial disclosures to the Utah Division of Consumer Protection, (3) pay a $250 annual registration fee, and (4) secure a $25,000 bond or letter of credit before their clients can solicit contributions in Utah.

After the State has received an application from an out-of-state fund-raising consultant, the Division has ten business days within which to approve or deny the application. Utah Admin.Code R152-22-4(3). The application may be denied or revoked if such action is in the public interest *and* upon a finding that (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Those who violate the Act are subject to administrative, civil, or criminal enforcement action. The Director may initiate administrative action to (1) suspend or revoke the registration, (2) order that the consultant cease and desist from its unlawful conduct, or (3) impose an administrative fine. Utah Code Ann, §§ 13-2-3, 6,12. Any such action is subject to provisions of the Administrative Procedures Act, Utah Code Ann. § 63-46b-1 *et seq.*, which guarantees the consultant's right to notice and a hearing.

The Division may also seek damages, civil penalties, and injunctive relief in state district court. Utah Code Ann. § 13-22-3. Any civil judgment rendered or administrative fine imposed against a consultant for violating the Act may be recovered from the bond or letter of credit posted by the consultant. Utah Admin. Code R152-22-6 (1996). Any fine or civil penalty imposed must be excused unless it appears, by a preponderance of the evidence, that the consultant acted in bad faith or with intent to harm the public. Utah Code Ann. § 13-22-3(5).

B. *Events Leading to this Lawsuit*

Plaintiff American Target Advertising, Inc. is a Virginia corporation that provides fund-raising services to nonprofit organizations. On behalf of its clients, American Target uses direct mail to solicit funds from the general public. American Target was retained by Judicial Watch, a nonprofit "political watchdog" organization incorporated in the District of Columbia, to plan, manage, and prepare materials relating to Judicial Watch's nationwide information distribution and fund-raising program.

In February, 1997, Judicial Watch applied for a fund-raising license with the Utah Division of Consumer Protection. The Division informed Judicial Watch that it would be ineligible for a license unless (a) American Target registered with the Division, (b) Judicial Watch agreed not to pay

American Target for its fund-raising consulting services, or (c) Judicial Watch agreed not to use American Target's services in connection with Judicial Watch's fund-raising activities in Utah.

Three months later, the Division granted Judicial Watch a fund-raising license. However, the Division made clear that the issuance of the permit was contingent upon Judicial Watch's promise not to use the services of any professional fund-raising consultant not licensed in Utah in connection with [its] fund-raising activities in Utah.

American Target then filed this lawsuit, claiming that the Utah Charitable Solicitations Act is unconstitutional under the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. After filing the Complaint, American Target filed a Motion for a Preliminary Injunction. Defendant agreed to the entry of an Order suspending enforcement of the Act with respect to American Target and Judicial Watch during the pendency of this lawsuit. American Target then filed a Motion for Summary Judgment. Defendant opposed that Motion and filed her own Motion for Summary Judgment.

The parties have conducted limited discovery, having taken the depositions of James E. B. Carney, Vice President of American Target, and Francine A. Giani, Director of the Utah Division of Consumer Protection. The parties have filed a Stipulation of Facts, setting forth facts as to which there is no dispute.

II. DISCUSSION

A. *Constitutionality Under the First Amendment*

It is beyond dispute that any law that restricts charitable solicitations is subject to First Amendment scrutiny. As the Supreme Court noted in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d

73 (1980), charitable solicitations "involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Id.* at 632, 100 S.Ct. 826.

However, it is equally well-settled that "[s]oliciting financial support is ... subject to reasonable regulation." *Id.* at 632, 100 S.Ct. 826. In order to survive a First Amendment challenge, a law that regulates charitable solicitations must (1) serve a substantial governmental interest, and (2) be "narrowly drawn . . . to serve th[at] interest[] without unnecessarily interfering with First Amendment freedoms." *Id.* at 637, 100 S.Ct. 826. *See also, Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

1. Substantial Interest

First, the Court must determine whether Utah's interest in enacting the legislation is substantial. The State's interest will be deemed substantial if the statute was enacted to " 'protect[] the public from fraud, crime, and undue annoyance.' " *Village of Schaumburg*, 444 U.S. at 635, 100 S.Ct. 826.

The stated purpose of the Act is "to protect [Utah] citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1. The Act seeks to fulfill this purpose by (1) preventing fraud and (2) providing a means of redress for victims of fraud.

It is undisputed that these interests are substantial, and based in part on past experience with persons who have used charitable fund-raising activities as vehicles for fraud. The Supreme Court has held that "[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley v. National Federation of the Blind*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

2. Narrow Tailoring

The second prong of the test requires the Court to determine whether the Act is narrowly tailored. Under this standard, the challenged statute need not constitute the "least restrictive means" of obtaining the legislative objective. *See e.g., Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In clarifying this standard, the Supreme Court has held that a law is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

American Target argues that four aspects of the Act fail under the narrow tailoring requirement: (1) the registration and disclosure requirement; (2) the registration fee; (3) the bond or letter of credit requirement; and (4) the allegedly overbroad discretion of the Director of the Division of Consumer Protection.

a. The Registration & Disclosure Requirement

The Act requires fund-raising consultants such as American Target to provide the Division with information about the consultant and its relationship with the charity it consults. The Act also requires the consultant to disclose the nature of any law enforcement actions taken against the consultant, its operators, principals, directors, officers, or managers. Utah Code Ann. § 13-22-9. Consumers may access this information from the State to verify representations made in solicitations and to assess the reliability and trustworthiness of those who participate in the solicitation process.

The Utah Act's registration and disclosure requirements appear to be consistent with the provisions upheld in *Riley v. Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In that case, the Court declared several provisions of North Carolina's charitable

solicitations law unconstitutional, but explained that "North Carolina may constitutionally require fund-raisers to disclose certain financial information to the State, as it has since 1981." 487 U.S. at 795, 108 S.Ct. 2667. The Utah Act's registration and disclosure requirements do not differ materially from those upheld in *Riley*.

The registration and disclosure requirements are narrowly tailored to enable private citizens to protect themselves from fraudulent activity. The information required is relatively simple and readily available to the consultant. As American Target concedes, much of the information required is already available in its own tax forms and fund-raising registration materials in Virginia. The Court concludes that the Act's disclosure and registration requirements are sufficiently narrowly tailored to pass constitutional muster. [1]

b. The Registration Fee

American Target also argues that the $250.00 annual registration fee fails under the narrow tailoring requirement. American Target claims that the fee will make the cost of

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[1] American Target also argues that the registration and disclosure requirements amount to an unconstitutional prior restraint because consultants must register prior to conducting solicitations. In support of this argument, American Target points out that the Court in *Riley* struck down a provision requiring the fund-raiser to obtain a license before soliciting.

But the fatal flaw in the North Carolina licensing scheme is not present in the Utah Act. As the Court observed, licensing requirements "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' " *Id.* at 802, 108 S.Ct. 2667 (quoting *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). The Court struck down the law because it did not impose a time limitation on the licensing agency, either by statute or administrative regulation. *Id.*

Utah's Act contains no such defect. By administrative regulation, the Division must process registration applications "within 10 business days of their receipt by the Division." Utah Admin.Code R152-22-4(3). In this way, the Division can fairly review the application while preserving the First Amendment rights of the consultant by assuring a prompt decision.

fund-raising so high that mass-mailed interstate charitable solicitations will become impossible.

In considering the constitutional permissibility of registration fees imposed upon professional charitable solicitors in the state of New York, the United States Court of Appeals for the Second Circuit observed:

> It is well-settled that charitable solicitation involves a variety of speech interests protected by the First Amendment. "[I]t is equally clear that while the exercise of constitutionally protected activities may not be taxed, it may be regulated, provided the regulation is narrowly tailored to achieve a legitimate government interest, is content-neutral in terms and effect, and does not unduly burden speech." Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible.

National Awareness Foundation v. Abrams, 50 F.3d 1159, 1164-65 (2d Cir.1995)(quoting *Center for Auto Safety, Inc. v. Alhey*, 37 F.3d 139, 144 (4th Cir.1994))(citations omitted); see also *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474 (6th Cir.1995) (upholding a $200 registration fee for professional solicitors).

American Target's attempt to distinguish *National Awareness Foundation v. Abrams* and *Dayton Area Visually Impaird Persons, Inc. v. Fisher* is unpersuasive. American Target argues that these cases are different than the case at bar because they deal with solicitors rather than professional fund-raising counsel. American Target argues that "solicitors" actually perform the act of soliciting money, and typically have possession over the funds that are contributed. But it is beyond dispute that American Target exercises significant control over the fund-raising and the money. Therefore,

the fact that American Target refers to itself as "counsel" rather than as a "solicitor" is irrelevant for our purposes here.

The fee provisions enable the State to defray the costs associated with the administration and enforcement of the Act. The Act itself mandates that the Division set an application fee that is "reasonable, fair, and reflect[s] the cost of services provided." Utah Code Ann. § 13-22-9(1)(a); Utah Code Ann. § 63-3 8-3.2(2). The evidence suggests that the Division complies scrupulously with this mandate, considering the resources it expends in administering and enforcing the Act in establishing the fee. Giani Affidavit, ¶ 7. No evidence in the record suggests that the fee is anything to the contrary. Therefore, the application fee survives constitutional scrutiny.

c. The Bond or Letter of Credit Requirement

For some of the same reasons, American Target argues that the requirement that consultants maintain a bond or letter of credit is unconstitutional. American Target claims that the requirement is more burdensome than necessary, and is not narrowly tailored to serve the State's interest of preventing fraud.

The Court is not convinced. This requirement protects the public by providing a fund from which victims can draw in the event that they are defrauded by charitable solicitors. Simultaneously, it also acts as a deterrent to fraudulent activity—presumably, fund-raisers will he less likely to defraud Utahns if they know that if they get caught, they will pay for it.

The United States Court of Appeals for the Sixth Circuit recently upheld Ohio's $20,000 bonding requirement, concluding that "because the bonding requirement imposed upon professional solicitors also attempts to deter fraud and to provide a fund from which to compensate charities for moneys, the district court [correctly] concluded that the requirement was narrowly tailored to serve a legitimate state interest."

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1486 (1995).

Similarly, the bonding or letter of credit requirements in the Utah Act are narrowly tailored to serve the substantial interest of the State in protecting charities and Utah residents from fraud. The State has not required consultants to deposit the entire $25,000 with the State or in an escrow account. Instead, the State has imposed the less-burdensome requirement that the consultant obtain either a bond from a surety company or a letter of credit from the consultant's financial institution. This provides the public with a source from which to draw in the event of loss.

The purpose of the Act could not be a as effectively without such the bond or letter of credit requirement. Accordingly, it survives the scrutiny of the First Amendment.

d. Improper Discretion

Finally, American Target argues that the Act gives the Director of the Division of Consumer Protection improper discretion in issuing fund-raising licenses. The Director may deny or revoke a license if (1) such action is in the public interest and (2) after making a specified finding of wrongdoing under the Act. Utah Code Ann. §13-22-12. American Target claims that this provision gives the Director unbridled discretion because neither the Act nor administrative regulations pertaining to its enforcement define what "public interest" is.

However, the Act requires that the Director make a specified finding of wrongdoing before denying or revoking a license. The provision governing specified findings of wrongdoing is quite narrow, giving the Director discretion only where (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative

order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentated, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Because the Director may only invoke her discretion after making a specific finding of wrongdoing in these limited areas, her discretion is quite narrow. In addition, the "public interest" language also places a limitation on the Director's discretion.

The denial and revocation provision does not give the Director undue discretion, and appears reasonably calculated to give the Act reasonable regulatory teeth. The Act could not be enforced as effectively without the provision. Accordingly, the Court concludes that it is narrowly tailored to further the purpose of the Act.

B. Constitutionality Under the Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce "among the several States." United States Constitution Art. 1 § 8, cl. 3. This power is significant in two respects. First, i[t] operates as an affirmative grant of authority, enabling Congress to enact legislation in areas that substantially affect interstate commerce. Second, and relevant here, it limits the states' police powers by prohibiting state

regulations that unduly burden interstate commerce. This limitation of state authority, commonly referred to as the "dormant" Commerce Clause, "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis v. BT Investment Managers, Inc.*, 441 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

The text of the Commerce Clause provides no guidance on the extent to which states can regulate interstate commerce in the absence of Congressional legislation. It has therefore been left to the courts to delineate the Commerce Clause-imposed boundaries of state regulation.

A state law may be found unconstitutional under the dormant Commerce Clause in either of two situations—either (1) where the state regulation directly regulates or otherwise discriminates against interstate commerce, *see e.g., Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), or (2) where the regulation operates in a nondiscriminatory manner, burdening interstate commerce only indirectly, and the burden imposed upon interstate commerce is clearly excessive in relation to the putative local benefits, *see e.g., Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

1. Direct Regulation of Interstate Commerce

American Target first argues that, through the framework established by the Utah Charitable Solicitations Act, the State of Utah is attempting to directly regulate contractual agreements between American Target and its nonprofit clients in other states. While acknowledging that the Act does not discriminate against interstate commerce on its face, American Target claims that the Utah Act is similar to the statute de-

clared unconstitutional in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) in that it attempts to directly regulate the out-of-state contracts of an out-of-state person, and therefore constitutes a virtual per se violation of the Commerce Clause.

In *Brown-Forman*, a distiller brought suit when the State of New York began requiring all liquor distillers doing business in New York to sell at a price no higher than the lowest price that the distiller charged anywhere else in the United States. The Supreme Court held that the statute violated the dormant Commerce Clause. Rather than relying on a discrimination rationale,[2] however, the Court attacked the law on grounds that it enabled New York to "project its legislation into" other states. The Court reasoned that the New York law

> [R]egulate[d] out-of-state transactions in violation of the commerce clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the Untied State during the relevant month. **Forcing a [business entity] to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce**. While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not "project its legislation into [other states] by regulating the price to be paid" for liquor in those states . . . That the [law] is addressed only to sales of liquor in New York is irrelevant if the "practical effect" of the law is to control liquor prices in other states. . .. Moreover, the proliferation of [similar state] laws . . . has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different states. . . . Thus New

[2] The Court declined using the discrimination rationale because the appellant conceded that the statute was "evenhanded."

> York has "project[ed]" its legislation into other states, and directly regulated commerce therein, in violation of [the dormant Commerce Clause].

Brown-Forman, 476 U.S. at 582-83, 106 S.Ct. 2080 (emphasis added) (citations omitted).

American Target analogizes its own plight to that of the plaintiff/distiller in *Brown-Forman*, arguing that Utah attempted to regulate American Target, an out-of-state business. In support of this argument, American Target points out that the Division of Consumer Protection denied Judicial Watch a license because of its relationship with American Target. Even when the Division later granted the license, it did so only on condition that Judicial Watch not correspond with Utah residents using materials developed with any assistance from American Target.

The Court is not persuaded. Unlike the *Brown-Forman* plaintiff, American Target's out-of-state activities are not being controlled by an overreaching state statute. American Target is subject to Utah regulation only to the extent that it provides consulting services in connection with charitable solicitations in Utah.

In no way does the Act regulate American Target's consulting services that do not pertain to charitable solicitations in Utah. Simply stated, the Act is not unconstitutional under *Brown-Forman* because it does not have the " 'practical effect' of . . . controll[ing] [professional fund-raisers] in other states." *Id.* at 582-83, 106 S.Ct. 2080.

2. Indirect Regulation of Interstate Commerce

The Supreme Court's ruling in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) is said to embody the modern negative Commerce Clause test in cases that do not involve facially discriminatory state regulations. In *Pike*, the Court held that the State of Arizona could not require Arizona cantaloupe growers to package their produce in Arizona. The Court explained that where the challenged state

statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" the statute will survive a dormant Commerce Clause attack unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844.

While acknowledging that Utah has a "legitimate local public interest" in enforcing the Act, American Target argues that the Act unduly burdens interstate commerce by imposing: (1) the annual application fee of $250.00, (2) the $25,000 bonding requirement, and (3) the registration and disclosure requirements. The party challenging a non-discriminatory statue under the dormant Commerce Clause "bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir.1992). American Target has failed to produce any evidence showing that the incidental burdens that the Act may impose on interstate commerce are clearly excessive in relation to the benefits that the Act produces.

Moreover, as explained above in the Court's discussion of American Target's First Amendment claims, the challenged provisions are reasonably necessary to prevent and remedy the effects of fraud. Any resulting burdens on interstate commerce are minimal by comparison. Accordingly, the Court concludes that the Act does not run afoul of the dormant Commerce Clause under the *Pike v. Bruce Church* balancing test.

C. The Charitable Solicitations Act Does Not Violate the Due Process Clause.

American Target also contends that the Act is invalid under the Due Process Clause of the Fourteenth Amendment, arguing that applying the Act to American Target constitutes "an impermissible extra-territorial exercise of the State's police

powers." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 24.

The Court does not agree. American Target plays a most significant role in Judicial Watch's solicitations, including those directed toward Utah. A reading of the Contract between Judicial Watch and American Target reveals that American Target (1) prepares the creative copy and design of the mailings, (2) plans and manages the production services relevant to direct mail solicitations. Agreement Between Judicial Watch and American Target, Complaint Exhibit 1,§ 1. It is safe to say that American Target is not only Judicial Watch's fund-raising consultant, it is primarily responsible for " build[ing] a [] base of supporters across the country" and within Utah. Deposition of American Target Vice President James Carney at 50.

In short, it is safe to say that American Target has " 'purposely directed' " its fund-raising efforts "toward residents of [Utah]." *Burger King Corp v. Rudzewicz*, 471 U.S. 462,476,105 S.Ct. 2174, 85 L.Ed 2d 528 (1985). In so doing, American Target has established minimum contacts with the State of Utah so as to subject itself to the jurisdiction of Utah courts in matters arising out of or relating to their Utah fund-raising activities. Utah may therefore require American Target to submit to the requirements of the Utah Charitable Solicitations Act without violating the Due Process Clause of the Fourteenth Amendment.

III. CONCLUSION

In Accordance with the foregoing, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED, and Defendant's Motion for Summary Judgment is GRANTED.

APPENDIX C

UTAH STAT. ANN. SECTIONS 13-22-1 *et seq.*

13-22-1 Short title.

This chapter is known as the "Charitable Solicitations Act."

13-22-2 Definitions.

As used in this chapter:

(1) (a) "Charitable organization" or "organization" means any person, joint venture, partnership, limited liability company, corporation, association, group, or other entity, excluding the state and its political subdivisions:

(i) that is or holds itself out to be:

(A) a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary, social welfare or advocacy, public health, environmental or conservation, or civic organization;

(B) for the benefit of a public safety, law enforcement, or firefighter fraternal association; or

(C) established for any charitable purpose;

(ii) who solicits or obtains contributions solicited from the public for a charitable purpose; or

(iii) in any manner employs a charitable appeal as the basis of any solicitation or employs an appeal that reasonably suggests or implies that there is a charitable purpose to any solicitation.

(b) "Charitable organization" includes a "chapter," "branch," "area," "office," or similar "affiliate" or any

person soliciting contributions within the state for a charitable organization that has its principal place of business outside the state.

(2) "Charitable purpose" means any benevolent, educational, philanthropic, humane, patriotic, religious, eleemosynary, social welfare or advocacy, public health, environmental, conservation, civic, or other charitable objective or for the benefit of a public safety, law enforcement, or firefighter fraternal association.

(3) "Charitable solicitation" or "solicitation" means any request, directly or indirectly, for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including any telephonic request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations in exchange for any advertisement, book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or the use of the name of any charitable organization or movement as an inducement or reason for making any purchase donation, or, in connection with any sale or donation, stating or implying that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose.

(4) (a) "Contribution" means the pledge or grant for a charitable purpose of any money or property of any kind, including any of the following:

(i) a gift, subscription, loan, advance, or deposit of money or anything of value;

(ii) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for charitable purposes; and

(iii) fees, dues, or assessments paid by members, when membership is conferred solely as consideration for making a contribution.

(b) Contribution" does not include:

(i) money loaned to a charitable organization by a financial institution in the ordinary course of business; or

(ii) fees, dues, or assessments paid by members when membership is not conferred solely as consideration for making a contribution.

(5) "Contributor" means any donor, pledgor, purchaser, or other person who makes a contribution.

(6) "Director" means the director of the Division of Consumer Protection.

(7) "Division" means the Division of Consumer Protection of the Department of Commerce.

(8) "Material fact" means information that a person of ordinary intelligence and prudence would consider relevant in deciding whether or not to make a contribution in response to a charitable solicitation.

(9) (a) "Paid solicitor" means any person who, for financial or other consideration:

(i) solicits contribution for charitable purposes; or

(ii) acts as an employee or agent for any charitable organization or professional fund raiser to solicit contributions for charitable purposes.

(b) "Paid solicitor" does not include any clerical employee who is not primarily involved with soliciting.

(10) (a) "Professional fund raiser," except as provided in Subsection (10)(b), means any person who:

(i) for compensation or any other consideration plans or manages the solicitation of contributions for or on behalf of any charitable organization or any other person;

(ii) engages in, or who holds himself out to persons in this state as being independently engaged in, the business of soliciting contributions for a charitable organization;

(iii) manages, supervises, or trains any paid solicitor; or

(iv) uses a vending device or vending device decal for financial or other consideration that implies a solicitation of contributions or donations for any charitable organization or charitable purposes.

(b) "Professional fund raiser" does not include a bona fide officer, director, volunteer, or full-time employee of a charitable organization.

(11) (a) "Professional fund raising counsel or consultant" or other comparable designation or title means a person who:

(i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;

(ii) does not solicit contributions; and

(iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.

(b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

(12) "Vending device" means a container used by a charitable organization, paid solicitor, or professional fund raiser, for the purpose of collecting a charitable solicitation, contribution, or donation whether or not the device offers a product or item in return for the contribution or donation. "Vending device" includes machines, boxes, jars, wishing wells, barrels, or any other container.

(13) "Vending device decal" means any decal, tag, or similar designation material that is attached to a vending device, whether or not used or placed by a charitable organization, paid solicitor, or professional fund raiser, that would indicate that all or a portion of the proceeds from the purchase of items from the vending device will go to a specific charitable organization.

13-22-3 Investigative and enforcement powers --Education.

(1) The division may make any investigation it considers necessary to determine whether any person is violating, has violated, or is about to violate any provision of this chapter or any rule made or order issued under this chapter. As part of the investigation, the division may:

(a) require a person to file a statement in writing;

(b) administer oaths, subpoena witnesses and compel their attendance, take evidence, and examine

under oath any person in connection with an investigation; and

(c) require the production of any books, papers, documents, merchandise, or other material relevant to the investigation.

(2) Whenever it appears to the director that substantial evidence exists that any person has engaged in, is engaging in, or is about to engage in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may do any of the following in addition to other specific duties under this chapter:

(a) in accordance with Title 63, Chapter 46b, Administrative Procedures Act, the director may issue an order to cease and desist from engaging in the act or practice or from doing any act in furtherance of the activity; or

(b) the director may bring an action in the appropriate district court of this state to enjoin the acts or practices constituting the violation or to enforce compliance with this chapter or any rule made or order issued under this chapter.

(3) Whenever it appears to the director by a preponderance of the evidence that a person has engaged in or is engaging in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may assess an administrative fine of up to $500 per violation up to $10,000 for any series of violations arising out of the same operative facts.

(4) Upon a proper showing, the court hearing an action brought under Subsection (2)(b) may:

(a) issue an injunction;

(b) enter a declaratory judgment;

(c) appoint a receiver for the defendant or the defendant's assets;

(d) order disgorgement of any money received in violation of this chapter;

(e) order rescission of agreements violating this chapter;

(f) impose a fine of not more than $2,000 for each violation of this chapter; and

(g) impose a civil penalty, or any other relief the court considers just.

(5)(a) In assessing the amount of a fine or penalty under Subsection (3) (4)(f), or (4)(g), the director or court imposing the fine or penalty shall consider the gravity of the violation and the intent of the violator.

(b) If it does not appear by a preponderance of the evidence that the violator acted in bad faith or with intent to harm the public, the director or court shall excuse payment of the fine or penalty.

(6) The division may provide or contract to provide public education and voluntary education for applicants and registrants under this chapter. The education may be in the form of publications, advertisements, seminars, courses, or other appropriate means. The scope of the education may include:

(a) the requirements, prohibitions, and regulated practices under this chapter;

(b) suggestions for effective financial and organizational practices for charitable organizations;

(c) charitable giving and solicitation;

(d) potential problems with solicitations and fraudulent or deceptive practices; and

(e) any other matter relevant to the subject of this chapter.

13-22-4 Violation a misdemeanor --Damages.

(1) A person who willfully violates any provision of this chapter, either by failing to comply with any requirement or by doing any act prohibited in the chapter, is guilty of a class B misdemeanor. Each day the violation is committed or permitted to continue constitutes a separate punishable offense.

(2) Nothing in this section precludes any person damaged as a result of a charitable solicitation from maintaining a civil action for damages or injunctive relief.

(3) The division may maintain an action for damages or injunctive relief on behalf of itself or any other person to enforce compliance with this chapter.

13-22-5 Registration required.

(1) It is unlawful for any organization that is not exempt under Section 13-22-8 to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable purpose, unless the organization is registered with the division.

(2) Subsection (1) does not prohibit an organization from receiving an unsolicited contribution.

(3) It is unlawful for any professional fund raiser to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable organization, whether or not the charitable organization is

exempt under Section 13-22-8, unless the professional fund raiser is registered with the division.

(4) It is unlawful for any professional fund raising counsel or consultant to knowingly plan, manage, advise, counsel, consult, or prepare material for, or with respect to, the solicitation in this state of a contribution for a charitable organization, whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raising counsel or consultant is registered with the division.

13-22-6 Application for registration.

(1) An applicant for registration or renewal of registration as a charitable organization shall:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division which shall include:

(i) the organization's name, address, telephone number, facsimile number, if any, and the names and addresses of any organizations or persons controlled by, controlling, or affiliated with the applicant;

(ii) the specific legal nature of the organization, that is, whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(iii) the names and residence addresses of the officers and directors of the organization;

(iv) the name and address of the registered agent for service of process and a consent to service of process;

(v) the purpose of the solicitation and use of the contributions to be solicited;

(vi) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(vii) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(viii) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available for application to the charitable purposes declared in the application, including a satisfactory statement of the factual basis for the projected percentage;

(ix) a statement of total contributions collected or received by the organization within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(x) a copy of any written agreements with any professional fund raiser involved with the solicitation;

(xi) disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the organization;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds for the solicitation or fundraising;

(xiii) a statement of whether or not the charity, or its parent foundation, will be using the services of a professional fund raiser or of a professional fund raising counsel or consultant;

(xiv) if either the charity or its parent foundation will be using the services of a professional fund raiser or a professional fund raising counsel or consultant:

(A) a copy of all agreements related to the services; and

(B) an acknowledgment that fund raising in the state will not commence until both the charitable organization, its parent foundation, if any, and the professional fund raiser or professional fund raising counsel or consultant are registered and in compliance with this chapter; and

(xv) any additional information the division may require by rule.

(2) If any information contained in the application for registration becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the registration fee, an organization failing to file a registration application or renewal by the due date or filing an incomplete registration application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the registration application or renewal were due to be filed.

13-22-7 Repealed.

13-22-8 Exemptions.

(1) Section 13-22-5 does not apply to:

(a) a solicitation that an organization conducts among its own established and bona fide membership

exclusively through the voluntarily donated efforts of other members or officers of the organization;

(b) a bona fide religious, ecclesiastical, or denominational organization if:

(i) the solicitation is made for a church, missionary, religious, or humanitarian purpose; and

(ii) the organization is:

(A) a lawfully organized corporation, institution, society, church, or established physical place of worship, at which nonprofit religious services and activities are regularly conducted and carried on;

(B) a bona fide religious group:

(I) that does not maintain specific places of worship;

(II) that is not subject to federal income tax; and

(III) not required to file an IRS Form 990 under any circumstance; and

(C) a separate group or corporation that is an integral part of an institution that is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) and is not primarily supported by funds solicited outside its own membership or congregation;

(c) a solicitation by a broadcast media owned or operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media;

(d) except as provided in Subsection 13-22-21(1), a solicitation for the relief of any person sustaining a

life-threatening illness or injury specified by name at the time of solicitation if the entire amount collected without any deduction is turned over to the named person;

(e) a political party authorized to transact its affairs within this state and any candidate and campaign worker of the party if the content and manner of any solicitation make clear that the solicitation is for the benefit of the political party;

(f) a political action committee or group soliciting funds relating to issues or candidates on the ballot if the committee or group is registered with the lieutenant governor's office under:

(i) Title 20A, Chapter 11, Part 6, Political Action Committee Registration and Financial Reporting Requirements; or

(ii) Title 20A, Chapter 11, Part 8, Political Issues Committees -- Registration and Financial Reporting;

(g) any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school;

(h) a public or higher education foundation established under Title 53A or 53B;

(i) a television station, radio station, or newspaper of general circulation that donates air time or print space for no consideration as part of a cooperative solicitation effort on behalf of a charitable organization, whether or not that organization is required to register under this chapter; and

(j) a volunteer fire department, rescue squad, or local civil defense organization whose financial oversight is under the control of a local governmental entity.

(2) Any organization claiming an exemption under this section bears the burden of proving its eligibility for, or the applicability of, the exemption claimed.

(3) Each organization exempt from registration pursuant to this section that makes a material change in its legal status, officers, address, or similar changes shall file a report informing the division of its current legal status, business address, business phone, officers, and primary contact person within 30 days of the change.

(4) The division may by rule:

(a) require organizations exempt from registration pursuant to this section to file a notice of claim of exemption;

(b) prescribe the contents of the notice of claim; and

(c) require a filing fee for the notice, as determined under Section 63- 38-3.2.

13-22-9 Professional fund raiser's or fund raising counsel's or consultant's permit.

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three- year period immediately preceding the date of the application;

(iv) whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(v) the names and residence addresses of any officer or director of the applicant;

(vi) the name and address of the registered agent for service of process and a consent to service of process;

(vii) if a professional fund raiser:

(A) the purpose of the solicitation and use of the contributions to be solicited;

(B) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(C) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged,

documentation to support the reasonableness of the flat fee; and

(E) a statement of total contributions collected or received by the professional fund raiser within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(viii) if a professional fund raising counsel or consultant:

(A) the purpose of the plan, management, advise, counsel or preparation of materials for, or respect to the solicitation and use of the contributions solicited;

(B) the method by which the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation will be organized or coordinated and the projected length of time of the solicitation;

(C) the anticipated expenses of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of total fees to be earned or received from the charitable organization declared in the application, and what percentage of the contributions collected as a result of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation are projected after deducting the total fees to be earned or received remain available to the charitable organization declared in the application,

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(xiii) anot commence until both the professional
state will nf or professional fund raising counsel or
fund raiser and the charity, its parent foundation, if
consultant

any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

(2) If any information contained in the application for a permit becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the permit fee, an applicant failing to file a permit application or renewal by the due date or filing an incomplete permit application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the permit application or renewal were due to be filed.

(4) (a) Each applicant shall provide proof that the applicant is either bonded or provide a letter of credit in the amount of at least $25,000.

(b) The bond or letter or credit shall be payable to the state for the benefit of parties who may be damaged by any violation of this chapter.

(c) (i) The issuer of a bond shall be a surety authorized to transact surety business in this state.

(ii) The letter of credit shall be from a federally insured depository institution.

(d) The applicant shall maintain the bond or letter of credit for the entire duration of the permit and for a period of not less than one year after the division received notice in writing from the professional fund raiser or professional fund raising counsel or consultant that all activities in the state have ceased.

(e) The division may prescribe rules under which parties may recover on the bond or letter of credit.

13-22-10 Obtaining, use and display of permits and information cards.

(1) (a) Each paid solicitor who makes a person-to-person solicitation for a charitable organization registered or required to be registered under this chapter shall, before making the solicitation, obtain an information card issued by the division.

(b) An information card may be obtained from:

(i) the division; or

(ii) if the charitable organization has obtained information cards under Subsection (2), from the charitable organization for whom the solicitation is being made.

(2) A charitable organization registered under this chapter may obtain information cards from the division upon payment of a $2 fee for each card. The charitable organization may distribute an information card only to a paid solicitor employed by the charitable organization.

(3) Each permit and information card issued by the division shall set forth such information as will assist any person solicited to determine the purpose for which the contribution is solicited, including:

(a) (i) if it is an information card or a professional fund raiser permit, the identity of the person making the solicitation;

(ii) if the permit is for a charitable organization, the identity of the organization;

(iii) if it is an information card, the identity of the organization for which the contribution is solicited;

(b) an official acknowledgment or seal that the permit is issued by the division or, in the case of an information card, that the card is on a form supplied by the division;

(c) the statement required under Subsection 13-22-14(2);

(d) the expiration date of the permit or information card; and

(e) any other information that the division may prescribe by rule.

(4) In any solicitation in person, each holder of a permit or information card shall maintain in his possession the permit or information card and shall display the permit or information card to each person solicited. In any telephonic solicitation, the information contained on the permit or information card shall be distinctly and clearly repeated as part of the solicitation.

(5) The division may by rule prescribe additional provisions to govern the manner of using, displaying, or communicating the information on the permit or information card in connection with a solicitation.

(6) A person who solicits contributions for no compensation is not required to have an information card but shall clearly inform the person solicited of the charitable organization on whose behalf the person is soliciting.

13-22-11 Expiration of registration and permits.

(1) Each charitable organization registration issued under this chapter expires annually on the earlier of January 1, April 1, July 1, or October 1 following the completion of 12 months after the date of initial issuance.

(2) Each professional fund raiser's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fund raiser ceases affiliation with the charitable organization named in the application for permit.

(3) Each professional fund raising counsel's or consultant's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fundraising counsel or consultant ceases affiliation with the charitable organization named in the application for permit.

(4) A registration or permit may be renewed only by complying with the requirements for obtaining the original registration or permit.

13-22-12 Grounds for denial, suspension, or revocation.

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

(2) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to revoke

or suspend a claim of exemption filed under Subsection 13-22-8(4), upon a finding that the order is in the public interest and that:

(a) the notice of claim of exemption is incomplete or false or misleading in any material respect; or

(b) any provision of this chapter, or any rule made or order issued by the division under this chapter has been violated in connection with a charitable solicitation by any exempt organization.

13-22-13 Prohibited practices.

In connection with any solicitation, each of the following acts and practices is prohibited:

(1) stating or implying that registration constitutes endorsement or approval by the division or any governmental entity;

(2) violating any of the requirements of this chapter or any rule made under this chapter;

(3) making any untrue statement of a material fact or failing to state a material fact necessary to make statements made, in the context of the circumstances under which they are made, not misleading, whether in connection with a charitable solicitation or a filing with the division; and

(4) violating an order issued by the division under Subsection 13-22-3(2) or (3).

13-22-14 Accuracy not guaranteed.

(1) By issuing a permit or by providing forms for an information card, the state does not guarantee the accuracy of any representation contained in the permit or information card, nor does it warrant that any statement made by the holder of the permit or information card is truthful. The state

makes no certification as to the charitable worthiness of any organization on whose behalf a solicitation is made nor as to the moral character of the holder of the permit or information card.

(2) The following statement shall appear on each permit and information card in uppercase letters, in close proximity to the seal or acknowledgment required under Subsection 13-22-10(3)(b): "THE STATE OF UTAH DOES NOT WARRANT THAT THE INFORMATION CONTAINED ON THIS CARD IS TRUE."

13-22-15 Financial reports required.

(1) Each charitable organization registered under this chapter shall, during its first year of registration, provide quarterly financial reports to the division within 30 days after the end of the quarter reported. Each report shall disclose:

(a) the gross amount of contributions received;

(b) the amount of contributions disbursed or to be disbursed to each charitable organization or charitable purpose represented;

(c) aggregate amounts paid to any professional fund raiser;

(d) amounts spent for overhead, expenses, commissions, and similar purposes; and

(e) the name and address of any paid solicitor used by the organization.

(2) After the first year of continuous registration, a charitable organization shall file an annual financial report or IRS Form 990 on an annual basis within 30 days after the end of the year reported.

(3) Each report required under this section shall be signed under oath by an officer or principal of the organization.

(4) The registration of any organization that fails to file a timely report or IRS Form 990 as required in this section or files an incomplete report or IRS Form 990 is automatically suspended pending a final order of the division under Section 13-22-12. The division may reinstate the registration after receiving:

(a) a report or IRS Form 990 fulfilling the requirements of this section;

(b) an application for renewed registration; and

(c) a penalty of $25 for each month or part of a month after the date on which the quarterly report or IRS Form 990 was due to be filed.

13-22-16 Separate accounts and receipts required.

(1) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall segregate and maintain all contributed funds in an account held separately from its operating account. The account shall be held in Utah at a depository institution regulated by the Department of Financial Institutions.

(2) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall maintain and use duplicate receipts for contributions of money, securities, and cash equivalents so that one receipt is issued to each contributor and one is maintained by the organization.

13-22-17 Written agreement required.

(1) A professional fund raiser may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(2) A professional fund raising counsel or consultant may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(3) A charitable organization may only engage the services of a professional fund raiser or professional fund raising counsel or consultant through written agreement.

(4) Copies of the agreement required by this section shall be attached to all applications for registration and or a permit.

13-22-18 Local ordinance.

This chapter does not prohibit any political subdivision of the state from enacting any ordinance regulating the solicitation of contributions within the subdivision's boundaries so long as the ordinance only coordinates enforcement of this chapter with the division.

13-22-19 Reciprocal agreements.

(1) The division may convey or exchange information obtained under this chapter with other agencies having regulatory authority over charitable organizations.

(2) The division may accept information that a charitable organization or professional fund raiser files in another state or with any federal agency or other organization in place of substantially similar information that is required to be filed under this chapter.

13-22-20. Renumbered.

13-22-21 Tax exempt organizations --Appeal on behalf of individual.

(1) If a charitable campaign consisting of exempt solicitations for the relief of a named individual sustaining a

life-threatening illness or injury, as described in Subsection 13-22-8(1)(d), collects proceeds in excess of $1,000, the organizer of the campaign shall give the division written notice of the following:

(a) the organizer's name and address;

(b) the name, whereabouts, and present condition of the person for whose relief the contributions are solicited including a letter from the person's attending physician detailing the illness or injury;

(c) the date the charitable campaign commenced; and

(d) the purpose to which the collected contributions are to be applied.

(2) Notice under Subsection (1) is due within ten days after commencing the appeal or collecting in excess of $1,000, whichever is later.

(3) If the organizer fails to file timely notice, the division shall inform the organizer of the notice requirement and give the organizer ten additional days as a grace period within which to file the notice. If the organizer fails to file the notice within the grace period, the division may issue a cease and desist order against the organizer.

(4) If, at any time, the division has reasonable cause to believe that the organizer is perpetrating a fraud against the public, or in any other way intends to profit from harming the public through the charitable campaign, it shall issue a cease and desist order against the organizer.